UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

KALEIDA HEALTH

Employer

and

CONCERNED CARPENTERS FOR A DEMOCRATIC UNION

Petitioner **Case 3-RC-077821**

and

BUFFALO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

Intervenor

and

NORTHEAST REGIONAL COUNCIL OF CARPENTERS

Intervenor

DECISION AND DIRECTION OF ELECTION

The Employer, Kaleida Health, is a not-for-profit corporation with offices and places of business located in the Western New York area where it is engaged in the operation of five acute-care hospitals and other health care institutions. Petitioner seeks to represent a unit of all journeymen and apprentice carpenters and millwrights[1] who are employed by the Employer and who perform work on building, construction and renovation projects within the Employer's existing facilities. These employees are currently covered by a Memorandum of Agreement ("MOA" herein) between the

[1] The record reveals that the Employer does not employ any millwrights.

Employer and the Buffalo Building and Construction Trades Council ("BBCTC" herein)[2] and a collective-bargaining agreement (the Associations Agreement) between The Associations, consisting of several New York State construction employer associations and the Northeast Regional Council of Carpenters United Brotherhood of Carpenters and Joiners of America ("NRCC" herein).[3] In addition to the MOA and the Associations Agreement, the Employer has complied with the terms of the individual contracts of craft unions who are signatory to the MOA. The MOA, discussed in greater detail below, is an agreement that the Employer negotiated with the BBCTC, which contains some terms and conditions of employment applicable to all in-house renovation construction craft employees. These terms and conditions of employment are in addition to, and are not contained in, individual collective-bargaining agreements between the craft unions that are signatory to the MOA and the Employer. No party asserts that the MOA or the collective-bargaining agreements are a bar to an election.

The parties disagree as to whether the petitioned-for unit is an appropriate unit. The Petitioner contends that although the Employer is an acute-care hospital, it is primarily engaged in the building and construction industry as it relates to the petitioned-for unit, and that the current relationship between the Employer and the BBCTC and NRCC is governed by Section 8(f) of the National Labor Relations Act ("Act" herein). The Petitioner argues that the petitioned-for unit is a distinct and homogenous group of skilled journeypersons and apprentice carpenters who are construction workers and not

[2] The BBCTC is an organization consisting of local construction trade unions.
[3] The Employer also has several collective-bargaining relationships pursuant to Section 9(a) of the Act with various unions, including the Service Employees International Union and the International Union of Operating Engineers which represent two units of the Employer's skilled maintenance employees who troubleshoot, maintain and repair the equipment at the Employer's facilities.

maintenance employees. Further, the Petitioner argues that the MOA and the NRCC collective-bargaining agreement are pre-hire agreements which can only be entered into pursuant to an 8(f) relationship and that neither BBCTC nor NRCC ever established majority support pursuant to Section 9(a) of the Act. Therefore, according to the Petitioner, the Board's Health Care Rule (the "Rule" herein) does not apply and a unit consisting solely of carpenters and millwrights is appropriate.[4] The Petitioner states it is seeking to "replace" the NRCC as the representative of the petitioned-for unit and that the BBCTC could continue to bargain with the Employer on all the construction trades' behalf, including on the Petitioner's behalf. The Petitioner also objects to the NRCC's participation in the hearing.[5] Finally, the Petitioner asserts that the petitioned-for unit is an appropriate craft unit under the Board's established criteria set forth in Mallinckrodt Chemical Works, 162 NLRB 387 (1966).

The BBCTC and NRCC contend that the Rule applies because the Employer is a health-care institution engaged in the operation of acute-care hospitals and further, that the only appropriate unit is a residual unit of skilled maintenance employees, i.e., the existing non-conforming unit of all crafts currently covered by the MOA between the Employer and the BBCTC. They further contend that if it is determined that the Rule does not apply, the petitioned-for unit is inappropriate because the circumstances herein do not support craft severance.

[4] The Petitioner also indicated, at the hearing, its willingness to proceed to an election if a unit other than the petitioned-for unit is found appropriate.

[5] The Petitioner contends that the NRCC should not have been allowed to participate in the hearing as an Intervenor inasmuch as it did not present any showing of interest. I find that the current MOA, which incorporates the collective-bargaining agreement between the Associations and NRCC, is sufficient to allow the NRCC to intervene in this proceeding. See Stockton Roofing Co., 304 NLRB 699 (1991) and NLRB Casehandling Manual, Part Two, Representation Proceedings Sec. 11022.1(d).

The Employer's position is that the petitioned-for unit is only appropriate if the Petitioner can simply "replace" the carpenters' current representative as a signatory to the MOA with the BBCTC. Thus, the Employer maintains that if the Petitioner can represent the petitioned-for unit under the same contractual relationship that the Employer currently has with the BBCTC and the NRCC, then it is not opposed to the petitioned-for unit.

As discussed below, based on the record and relevant Board law, I conclude that the Employer operates acute-care hospitals where the employees in the petitioned-for unit perform work and, therefore, the Rule applies. Further, I conclude that a unit of all full-time and regular part-time craft employees employed by the Employer who perform in-house construction renovation, is the only appropriate unit[6] and direct that an election be held in that unit. Finally, I conclude that the BBCTC and the unions that are signatory to the MOA are joint bargaining representatives and should appear on the ballot as such.

The Board's Health Care Rule

On April 21, 1989, the Board established eight appropriate bargaining units in acute-care hospitals in its Final Rule on Collective Bargaining Units in the Health Care Industry, 29 CFR Part 103.30(a). The Board's Rule states:

> Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B)

[6] Because the unit in which an election is directed herein is significantly larger than the unit petitioned for, I shall allow the Petitioner until the close of business **June 18, 2012**, to submit to the Buffalo office of Region 3 of the National Labor Relations Board, additional cards necessary to support a 30 percent showing of interest in the larger unit, unless a request for review by the Petitioner challenging my unit finding is timely filed, in which event the submission of the additional showing of interest will be due, if appropriate, 10 days from the date of the Board's action on the request for review. Should the Petitioner not wish to proceed to an election in the broader unit, it will be permitted, upon request, to withdraw its petition without prejudice.

> of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:
>
> (1) All registered nurses.
> (2) All physicians.
> (3) All professionals except for registered nurses and physicians.
> (4) All technical employees.
> (5) All skilled maintenance employees.
> (6) All business office clerical employees.
> (7) All guards.
> (8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

284 NLRB at 1586-1587.

The Rule seeks to avoid undue proliferation of bargaining units. While engaged in the 1984 rulemaking, the Board carefully considered the 1974 health care amendments as well as its own strongly-held view that the number of units found appropriate should not be so many as to lead to a splintering of the workforce by occupations and professions found within the industry. Specifically, the Board stated:

> We believe that Congressional and industry concern with proliferation was directed towards the fifteen to twenty plus units that had arisen in the health care and other industries prior to the amendments and the possibility of scores of units if each hospital classification were permitted to organize separately.
>
> As stated in Senator Taft's proposal, Congress feared that patterns such as developed in construction and newspaper industries – wherein units were permitted for each craft, resulting in 15-20 or more units—would result in separate units for the equally, if not more, numerous classifications in a hospital.

284 NLRB at 1575.

In response to particular concerns that a skilled maintenance unit would lead to proliferation of bargaining units in the health care industry, the Board stated that "the skilled maintenance employee unit may be viewed as a consolidation of specialized employees inasmuch as it combines such employees as carpenters, painters, plumbers, and electricians." 284 NLRB at 1559.

Non-Conforming and Residual Units Under the Rule

Section 103.30(c) of the Rule provides:

> Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

284 NLRB at 1597.

At the time the Board promulgated the Rule, it anticipated that issues with regard to the representation of units that are residual to non-conforming units would arise. 284 NLRB at 1580-1597. Because the issue was not extensively addressed during the rulemaking process, the Board specifically deferred their resolution to the adjudication of particular cases presenting those issues. The Board, subsequent to the Rule, interpreted the phrase in Section 103.30(c) "insofar as practicable" with one of the enumerated units to mean that new units should conform as closely as possible to one of the eight units, given the preexistence of non-conforming units. See St. Mary's Duluth Clinic, 332 NLRB 1419, 1421 (2000).

In determining that Section 103.30(c) of the Rule is intended to apply only to petitions for a "new unit of previously unrepresented employees," the Board emphasizes the literal language of the Rule and its accompanying comments, as well as the Board's

longstanding policy of according deference to collective-bargaining history and the promotion of industrial and labor stability. See St. Mary's Duluth Clinic, supra; and Kaiser Foundation Hospitals, 312 NLRB 933 (1993). In Kaiser Foundation Hospitals, the Board concluded that Section 103.30(c) of the Rule does not apply to petitions that seek to carve out or sever a group of skilled maintenance employees from an existing non-conforming unit of all nonprofessional employees, even when the unit sought conforms to one of the Rule's enumerated units. 312 NLRB at 934-935.

The Board first addressed the issue of representation of units that are residual to non-conforming units in St. John's Hospital, 307 NLRB 767 (1992). In St. John's Hospital, an incumbent union that represented an existing non-conforming unit of plumbers and refrigeration employees at an acute-care hospital filed a petition seeking to represent a separate unit consisting of some, but not all, of the remaining skilled maintenance workers at the facility. The Board held that any election to determine a representative for unrepresented skilled maintenance workers would have to include all the remaining skilled maintenance workers residual to the existing unit or units.

The issue of whether the Board will process a petition filed by a nonincumbent labor organization for a non-conforming bargaining unit consisting of some, but not all, of the employees who would otherwise constitute an appropriate unit under the Rule, was addressed in St. Mary's Duluth Clinic, supra. The Board, in St. Mary's Duluth Clinic, concluded that a unit of all unrepresented technical employees employed by the employer, an acute-care hospital, petitioned-for by a non-incumbent labor organization, was an appropriate residual unit since it included all of the unrepresented technical employees who were residual to the existing unit of licensed practical nurses represented

by the incumbent union. The Board further concluded that the incumbent union was entitled to participate as an intervenor and was entitled to a place on the election ballot.

Section 103.30(d) of the Rule provides that nothing shall preclude Regional Directors from approving stipulated units that do not conform to those established by the Rule, as long as they are otherwise acceptable.

The parties stipulated, and I find, that the Employer operates acute-care hospitals. Therefore, I conclude it is proper to consider whether the unit sought is appropriate under the Rule. The record evidence discloses the following:

The Employer is the largest health care provider in Western New York. Its mission is to advance the health of the community. The Employer operates five acute-care hospitals (Buffalo General Hospital, Women and Children's Hospital, DeGraff Memorial Hospital, Millard Fillmore Suburban Hospital, and Gates Vascular Institute) where it services more than 1 million sick or injured patients annually. It employs over 10,000 employees.

The Petitioner argues that the Section 8(f) exemption applies to the Employer because it is engaged primarily in the building and construction industry as it relates to the petitioned-for unit and, therefore, this case should not be analyzed under the Rule. The record evidence discloses the following with regard to the Employer's in-house construction renovation work:

David Croston, Vice President and Chief Technology Officer for the Employer, testified that in 2006, the Employer applied for and received a general contractor's license from the City of Buffalo for purposes of performing in-house construction renovation. Croston testified that the Employer wanted to control the prompt production

and completion of its in-house renovation projects; therefore, he initiated discussions with Paul Brown, president of the BBCTC, for a pool of skilled labor to perform in-house construction renovation. Those discussions resulted in the parties agreeing to a one-year MOA. Two subsequent MOAs have been entered into by the parties, the most recent of which is effective from July 1, 2011 through July 30, 2016.

All of the MOAs since 2006 were negotiated by Croston and Brown. The MOA states that it will apply to "small construction projects" related to the Employer's renovations. Croston testified that small construction projects included renovation projects valued at under five million dollars. The MOA contains some terms and conditions of employment that were negotiated by the BBCTC and the Employer, such as hours of work, break times, the ratio of apprentices to journeypersons on the job, and the BBCTC and signatory local unions' agreement that there will be no work stoppages. The Employer and the BBCTC also agreed that the Employer would apply the terms of the respective signatory union's collective-bargaining agreement that governs the trade of the individual employee who is hired to perform in-house renovation, unless modified by the MOA. None of the signatory unions to the MOA attended negotiations for the MOA.

Joint Bargaining Representatives

The Petitioner questions which labor organization is the current collective-bargaining representative for the petitioned-for unit. In determining whether two unions were joint representatives of the bargaining unit employees, the Board, in Tree-Free Fiber Co., 328 NLRB 389, 398 (1999), found that the factual analysis by the administrative law judge of the relationship between an international and two local unions established that they were joint collective-bargaining representatives. The factors considered were the

parties bargaining history, including the administration of the collective-bargaining agreement and participation in contract negotiations.

The record reveals that the current MOA is signed by the following constituent local unions of the BBCTC: Asbestos Workers Local Union No. 4, Boilermakers Local Union No. 7, Bricklayers Local Union No. 3, Carpenters Local Union No. 289,[7] Cement Masons Local Union No. 111, Ironworkers Local Union No. 6, Laborers Local Union No. 210, Millwrights Local Union No. 1163, Operating Engineers Local Union No. 17, 17A, 17B, 17C & 17RA, Painters District Council No. 4, Plasterers Local Union No. 9, Plumbers and Steamfitters Local Union No. 22, Roofers Local Union No. 74, Road Sprinklerfitters Local Union No. 669, and Technical Engineers UIOE Local Union No. 17D.[8]

Brown provided the Employer with a copy of all of the signatory local unions' collective-bargaining agreements and the Employer has been applying their terms**.** In addition to hiring employees, the Employer hires individuals provided by each of the signatory crafts to be foremen and stewards. Foremen are responsible for oversight of the

[7] Although record testimony reveals that Local 289 ceased to exist as of April 4, 2011, it also reveals that pursuant to the terms of the MOA, the Employer recognizes the NRCC's Northwest Region collective-bargaining agreement and applies the current June 1, 2011 – May 13, 2016 agreement between the NRCC and "The Associations" to the former Local 289 carpenters it employs.

[8] The following local unions listed on the MOA did not sign the MOA: Electrical Workers Local Union No. 41, Elevator Constructors Local Union No. 14, and Teamsters Local Union No. 449. Record testimony establishes that the Electrical Workers refused to sign the MOA because one of the contractors with which it has a long-time collective-bargaining relationship performs substantial electrical work as a subcontractor for the Employer and the Electrical Workers did not want to interfere with that arrangement. Thus, some of the in-house construction renovations are performed by the Employer's direct hires that are referred by various labor organizations signatory to the MOA and some of the work is performed by employees of subcontractors. The record does not disclose why the Elevator Constructors and the Teamsters did not sign the MOA. There is nothing in the record that indicates that the Employer has employed employees represented by the Elevator Constructors or the Teamsters or whether the Employer has utilized subcontractors that have employed employees in these trades.

work being performed by the employees in their respective crafts. Stewards police their respective crafts' collective-bargaining agreements.

Based on the record evidence, including bargaining history and contract administration, as well as Board case law, I conclude that the BBCTC and the signatory local unions are joint collective-bargaining representatives of all craft employees performing in-house construction renovation. The BBCTC has bargained with the Employer for the past six years regarding a number of terms and conditions of employment, as set forth in the MOA. In addition, each signatory craft provided a copy of its collective-bargaining agreement which contain additional terms and conditions of employment, including wage rates, that the Employer has honored. Further, the record reveals that each trade union signatory to the MOA provides a steward, who is responsible for administering the collective-bargaining agreement at the Employer's facilities. See Tree-Free Fiber Co., supra. See also CBS Broadcasting, Inc., 343 NLRB 871 (2004), and cases cited therein.

Employer Operating as a General Contractor in the Construction Industry

The record testimony reveals that David Croston is also the head of the Division of Construction and Planning for the Employer. In this regard, he is responsible for facilities and construction. Croston testified that prior to 2006, the Employer used outside contractors to perform in-house construction renovations.[9] Since 2006, the Employer completed several in-house construction renovation projects at its five-acute care hospitals by using a labor pool of skilled employees from the signatory construction trade unions. Croston testified that during the period 2009 through 2011, the Employer

[9] Since 2006, the Employer has hired general contractors and continued to use outside contractors to build new facilities.

has employed "a very consistent group" of skilled labor from the signatory trade unions, approximately 20 of whom are carpenters. Since 2006, the Employer hired and laid off additional craft employees, on an as-needed basis. The Employer employed 145 craft employees, including carpenters, painters, plumbers, plasters, cement masons, laborers, and asbestos workers to perform in-house construction renovations from pay period 7, 2011 to pay period 7, 2012, 68 of whom were carpenters.[10] At no time since 2006, has the BBCTC or any other local union signatory to the MOA ever demonstrated majority status among this group of employees or subgroup thereof.

Section 8(f) of the National Labor Relations Act provides for an employer, which is engaged primarily in the building and construction industry, to make an agreement covering employees engaged in the building and construction industry with a labor organization of which building and construction employees are members without said labor organization having established majority status under the provisions of Section 9 of the Act prior to making such agreement. The Petitioner argues that the Employer is engaged primarily in the building and construction industry because it acts as its own general contractor, has entered into pre-hire agreements with the BBCTC and the signatory local unions, and the petitioned-for unit is performing construction work. The Petitioner relies solely on an Office of the General Counsel, Division of Advice Memorandum, in *Wegman's Food Markets, Inc.*, 3-CA-17272 (1992), for the premise that an employer, not generally known as being engaged in the construction industry, for purposes of the administration of the Act, can be deemed "primarily engaged in the building and construction industry." The *Wegman's* Advice Memo, however, is not binding on the Board. Such memoranda are, rather, the prosecutorial positions of the

[10] The record does not reveal the specific dates of the referenced pay periods.

General Counsel. See D.R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012), slip op. at 8, fn. 15. The *Wegman's* case was never litigated resulting in a Board decision; therefore, it has no precedential value in the instant case.

In Zidell Explorations, 175 NLRB 887 (1969), which is cited in the above-referenced Advice Memorandum, the Board found that an employer, whose primary operation was dismantling ships and buildings to obtain salvageable materials which it then used to build factories, warehouses, barges, ships and cranes, was also primarily engaged in the building and construction industry under Section 8(f), for purposes of a major construction project with the U.S. Department of Defense to dismantle a missile complex. The Board additionally found that Zidell frequently engaged in transitory on-site operations in the construction industry similar to those performed at the missile sites and employed skilled craftsmen and operators normally associated with the building and construction industry required to accomplish its objectives.

The Intervenors argue in their briefs that the Board's decision in Zidell Explorations, Inc., supra, is distinguishable from the facts of the instant case. The BBCTC argues that the Board determined that Zidell was engaged in two separate operations. The NRCC argues that, unlike the Employer in the instant case, Zidell was acting as a contractor to another owner for major construction. The NRCC further argues that the Employer herein is not even acting as its own general contractor for major new build construction that it simply is supplementing its own workforce with skilled craft employees in its existing facilities.

Zidell is distinguishable from the instant case. Zidell did not involve an acute-care hospital, which is subject to the Rule. Pursuant to Congressional concern

about undue proliferation in acute-care hospitals, in 1989, the Board developed a Rule specifically to be applied to them. The Rule cannot simply be ignored because an employer that is otherwise subject to the Rule, has chosen to perform its own in-house renovations. If the Rule is ignored and the petitioned-for unit is found appropriate, the very situation that Congress and the Board desired to avoid would present itself here. Accordingly, I reject the Petitioner's assertion that the Rule should not apply.

The Appropriate Unit

This case presents a novel issue, as the Employer is an acute-care hospital, to which the Rule is applicable, but which has voluntarily entered into pre-hire agreements allowed only under Section 8(f) for construction employers in the construction industry. Section 103.30(c) of the Rule is intended to apply only to petitions for a "new unit of previously unrepresented employees." Thus, the current collective-bargaining relationship between the Employer and the BBCTC and the signatory unions is not one that is clearly recognized by the Board under Section 103.30(c). I conclude, however, that, for purposes of determining an appropriate unit, the craft employees at issue herein are akin to a residual unit of unrepresented employees, as only a Section 8(f) relationship exists pursuant to the pre-hire agreement between the Employer and the BBCTC and the signatory unions.[11]

Section 103.30(c) does not authorize petitions to sever or carve out a group of employees from an existing nonconforming unit. If the Petitioner is seeking a non-

[11] Consistent with this approach, the record reveals no evidence that the BBCTC and the signatory unions ever established majority status as the Section 9(a) representatives of the employees at issue. I further note that the parties stipulated at the hearing that the pre-hire agreement between the Employer and the BBTCTC and the signatory unions is not a bar for purposes of an election herein. In any event, the Board, in John Deklewa & Sons, 282 NLRB 1375, 1377-78 (1987), held that a Section 8(f) agreement will not bar the processing of a valid petition filed pursuant to Section 9(c) of the Act.

conforming unit, it must seek to represent a residual unit of all unrepresented craft employees within the skilled maintenance unit or the preexisting recognized non-conforming craft unit. If the petitioned-for unit in an acute-care hospital is narrower in scope than either a residual or a non-conforming unit, the Board will refuse to direct an election in such a unit. See St. John's Hospital, 307 NLRB 767 (1992); Kaiser Foundation Hospitals, 210 NLRB 949 (1974). In either case, the appropriate unit can only consist of all full-time and regular part-time craft employees employed by the Employer who perform in-house construction renovations.

Section 103.30(c) also provides that when a petition for a new unit is filed, the Board shall find appropriate only units which comport, insofar as practicable, with one of the eight appropriate units. The Board, in acknowledging the preexistence of non-conforming units, clarified that units should conform as closely as possible to one of the eight appropriate units. St. Mary's Duluth Clinic, 332 NLRB 1419, 1421 (2000). In establishing the eight bargaining units set forth in the Rule, the Board considered Congress' specific concern that allowing separate units for each classification in an acute-care hospital setting, such as are permitted for each craft in the construction industry, would cause undue proliferation. 284 NLRB at 1575. Thus, the Board established a skilled maintenance unit as one of the eight appropriate bargaining units in an acute-care hospital. 284 NLRB at 1586-1587. In considering the skilled maintenance unit, the Board expressly contemplated that craft employees, such as carpenters, electricians, masons/bricklayers, painters, pipefitters, plumbers, sheetmetal fabricators, would be among the classifications that should generally be included in the skilled maintenance

unit. 284 NLRB at 1561. Based on the foregoing, I conclude that the craft employees covered by the instant petition are a residual unit of skilled maintenance employees.

In an acute-care hospital, the Board allows a non-incumbent union to petition for a unit of unrepresented employees residual to an existing unit, however, it must be for all such employees, not just some of them. St. Mary's Duluth Clinic, supra. The Board requires that all unrepresented employees residual to an existing unit be included in an election. St. John's Hospital, 307 NLRB 767 (1992). Thus, a unit limited to the residual journeymen and apprentice carpenters and millwrights would not be appropriate under the Rule. Based on the above, I conclude that the only appropriate unit under the Rule is a residual unit of all craft employees who perform in-house construction renovation. Accordingly, I conclude that the petitioned-for unit of carpenters and millwrights is not an appropriate unit and decline to direct an election solely for those classifications. The Petitioner, however, indicated at the hearing that it is willing to go forward if a unit other than the petitioned-for unit is found appropriate.

As noted above, the parties stipulated, and I find, that the contract is not a bar to an election. However, since the Employer, the BBCTC and the signatory local unions have maintained a stable six-year collective-bargaining relationship and have been abiding by a current MOA and collective-bargaining agreements, I conclude that the BBCTC and the signatory local unions should be entitled to a place on the ballot for an election in a unit of all craft employees. See Stockton Roofing Co., 304 NLRB 699, 700 (1991), in which the Board held that a union, pursuant to its current or recently-expired pre-hire agreement with the employer, had the right to proceed to an election under Section 9(c) of the Act, and could rely on the pre-hire agreement as the basis for an

adequate showing of interest, where, as here, there was an extensive bargaining history between the parties.

Alternative Appropriate Unit Analysis

As an alternative to the analysis above, which treats the craft employees who perform in-house construction renovation work as akin to an unrepresented unit, I conclude that the craft employees constitute a pre-existing non-conforming unit which is acceptable under the Rule. I base this conclusion on the fact that the BBCTC and the signatory local unions currently enjoy limited Section 9(a) representational status pursuant to Section 8(f) of the Act based on the current MOA and collective-bargaining agreements.

It is clear from the record that the Employer chose to recognize the BBCTC and the signatory local unions and has maintained a six-year stable collective-bargaining relationship with them. The Board is reluctant to disturb bargaining units established by mutual consent where there has been a long history of continuous bargaining, including in an acute-care hospital setting. See Kaiser Foundation Hospitals, 312 NLRB 933 (1993). The Board also allows an acute-care hospital to stipulate to units that do not conform to the established Rule. See Section 103.30(d) of the Rule. With Board approval, an employer is free to agree to collective-bargaining representation in a non-conforming unit. Further, it is clear that the Board accords great deference to collective-bargaining history. See Crittenton Hospital, 328 NLRB 879 (1999). Here, however, as noted above, carving out a portion of a non-conforming unit, as Petitioner seeks to do, is not appropriate. Kaiser Foundation, Hospitals, supra.

Thus, under this alternative analysis, because the BBCTC and the signatory local unions currently enjoy limited Section 9(a) representational status pursuant to Section 8(f) of the Act, based on the current MOA and the signatory unions' collective-bargaining agreements, they are entitled to a place on the ballot for an election as the incumbent joint collective-bargaining representative of a pre-existing nonconforming unit. See St. Mary's Duluth Clinic, 332 NLRB 1419 (2000).

Petitioner's Craft Severance Argument

The Petitioner is seeking to sever the crafts of carpenters and millwrights from the rest of the craft employees who perform the Employer's in-house renovations. I conclude that, regardless of whether the Rule is applied to the instant matter, the petitioned-for unit is not an appropriate unit under the criteria set forth in Mallinckrodt Chemical Works, 162 NLRB 387 (1966), which addresses the issue of whether historically-recognized craft employees may be severed from a larger unit on the basis of their craft.

Regardless of whether the instant case is governed by the Rule, the petitioned-for unit must be analyzed under the craft severance criteria established in Mallinckrodt Chemical Works, 162 NLRB 387 (1966). The Board has found that the application of *Mallinckrodt* craft-severance principles in the health-care setting is fully consistent with the Congressional directive to avoid undue proliferation of bargaining units, in light of the heavy burden which *Mallinckrodt* places on the party seeking severance. See Kaiser Foundation Hospitals, 312 NLRB 933, fn. 15 (1993). In *Mallinckrodt*, the Board recognized the need to balance the interest of the employer and the total employee compliment in maintaining industrial stability and the resulting benefits of an historical plantwide bargaining unit against the interest of a portion of such complement.

Therefore, the Board established the following relevant factors in considering craft severance: whether the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen or a functionally distinct department; the collective-bargaining history related to those employees; the extent to which the petitioned-for unit has established and maintained a separate identity during its inclusion in the overall unit; the degree of integration of the employer's production processes; the qualifications of the union seeking severance; and the pattern of collective bargaining in the industry.

In Kaiser Foundation Hospitals, supra, the Board dismissed a petition seeking to sever the skilled maintenance employees from a non-conforming unit of nonprofessional employees in an acute-care hospital setting. The Board found that Section 103.30(c) of the Rule did not apply where the existing unit is broader than those which the Rule envisions and the petition seeks to sever some of the represented employees from that unit. The Board considered the appropriateness of the petitioned-for unit under the craft-severance principals of *Mallinckrodt* and relied on the following criteria: The employer and the incumbent union had a substantial and long-term collective-bargaining history; the collective-bargaining relationship was predominantly stable; there was no evidence that the intervenor failed to give adequate representation to the employees; the evidence did not establish that the skilled maintenance employees maintained a separate identity or that the petitioner was particularly qualified to represent a traditional craft union. The Board also noted that although the skilled maintenance employees generally constitute a homogeneous craft, the Board has declined to sever a group of employees in the face of substantial bargaining history on a plantwide basis. Finally, the Board stated:

> The Board is reluctant, absent compelling circumstances, to disturb bargaining units established by mutual consent where there has been a long history of continuous bargaining, even in cases where the Board would not have found the unit to be appropriate if presented with the issue ab initio.

312 NLRB at 936.

In the instant case, the record discloses that the carpenters are an integral part of a larger complement of craft employees who work side-by-side to complete small in-house renovation projects. The carpenters have an intimate connection with the work of the overall craft unit. The project cannot be completed without each craft performing its particular function in conjunction with the other crafts. The role of the Employer's general foreman/supervisor is to coordinate those efforts. Each craft has maintained a separate identity, to some degree, by the terms and conditions of employment set forth in its respective collective-bargaining agreement. However, some of the terms and conditions of employment in the MOA were negotiated collectively by the BBCTC and the Employer.

The Employer, the BBCTC and the signatory local unions have a six-year history of collective bargaining on behalf of all craft employees employed by the Employer who perform in-house construction renovation. The carpenters' tools are stored in a common area with the rest of the skilled trades. Their hours of work, breaks, and the ratio of apprentices to journeypersons are the same, as set forth in the MOA. While the Employer hires foremen who direct the work of their respective trade, there is no evidence that the foremen have supervisory authority as defined in Section 2(11) of the Act. The record reveals, rather, that the carpenters have the same overall supervision as the rest of the trades.

The record establishes that the Petitioner is a newly-created independent union that is not currently affiliated with any international union, and, as of the date of the hearing, has not elected or appointed any officers. The Petitioner has not negotiated any collective-bargaining agreements with the "Associations," or any other entity, setting forth the industry standards that the Employer herein has routinely accepted as part of the MOA with the BBCTC.

I conclude that the petitioned-for unit which seeks to sever the carpenters and millwrights from the remaining crafts is not an appropriate unit under the Mallinckrodt criteria for the following reasons: The carpenters' duties are essential to the Employer's overall renovation process. The Employer, the BBCTC and the signatory local unions have a stable six-year collective-bargaining history in an overall craft unit.[12] The record reveals no evidence to the contrary. The record reveals no evidence that the joint collective-bargaining representatives failed to give adequate representation to the employees. See Beaunit Corp., 224 NLRB 1502 (1976), where the Board found that severance of a unit of electrical and instrument mechanics was inappropriate because the parties had a 7-1/2 year bargaining history in an overall production and maintenance unit, the employees' duties were essential to the overall production process, and the petitioner had no experience in representing a unit of electrical mechanics and instrument

[12] The Petitioner argues that no real bargaining occurs between the Employer and the BBCTC. Rather, the Petitioner contends, the bargaining occurs between the NRCC and the Associations, which resulting collective-bargaining agreement is simply adopted by the Employer in the MOA. The record discloses, however, that the MOA contains a number of terms and conditions of employment negotiated directly by the BBCTC and the Employer, including hours of work, break times, the ratio of apprentices to journeypersons on the job, and the BBCTC and signatory local unions' agreement that there will be no work stoppages. Moreover, the cases cited by the Petitioner in its post-hearing brief, Allen Drywall, Inc., 333 NLRB 1005 (2001); John Deklewa & Sons, Inc., 282 NLRB 1375 (1987); Dezcon, Inc., 295 NLRB 109 (1989); and Baron Heating and Air Conditioning, 343 NLRB 450 (2004), for the proposition that the Board gives little weight to bargaining history in 8(f) unit determinations, are inapposite because they concern situations that do not involve acute-care hospitals and non-conforming units.

mechanics. As noted above, the Petitioner is a recently-formed union with no history of collective-bargaining in this unit or any other unit representing employees in the carpenters' trade.

In addition, the pattern of bargaining in the acute-care hospital industry has been as established by the Rule, to include all crafts, such as carpenters, painters, plumbers and electricians, in a skilled maintenance unit. Further, the record in the instant case reveals no compelling circumstances which would warrant a disturbance of the bargaining unit established by mutual consent, where there has been a long history of continuous bargaining. See Kaiser Foundation Hospitals, 312 NLRB 933, 936 (1993). In *Kaiser*, the Board refused to sever a unit of skilled maintenance employees from an overall unit of nonprofessional employees where the employer and the incumbent union had a substantial and long-term collective-bargaining history; the collective-bargaining relationship was predominantly stable; there was no evidence that the intervenor failed to give adequate representation to the employees or that the petitioner was particularly qualified to represent a traditional craft union.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, BBCTC and NRCC are labor organizations within the meaning of Section 2(5) of the Act and claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

> A residual unit of all full-time and regular part-time craft employees employed by the Employer who perform in-house construction renovation; excluding all skilled maintenance employees represented by SEIU or IUOE, all other employees, professional employees, and guards and supervisors as defined in the Act.

There are approximately 145 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the Unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by:

CONCERNED CARPENTERS FOR A DEMOCRATIC UNION;

OR

BUFFALO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, AND THE FOLLOWING MEMBER LOCALS: ASBESTOS WORKERS LOCAL UNION NO. 4, BOILERMAKERS LOCAL UNION NO. 7, BRICKLAYERS LOCAL UNION NO. 3, NORTHEAST REGIONAL COUNCIL OF CARPENTERS, CEMENT MASONS LOCAL UNION NO. 111, IRONWORKERS LOCAL UNION NO. 6, LABORERS LOCAL UNION NO. 210, MILLWRIGHTS LOCAL UNION NO. 1163, OPERATING ENGINEERS

LOCAL UNION NO. 17, 17A, 17B, 17C & 17RA, PAINTERS DISTRICT COUNCIL NO. 4, PLASTERERS LOCAL UNION NO. 9, PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 22, ROOFERS LOCAL UNION NO. 74, ROAD SPRINKLERFITTERS LOCAL UNION NO. 669, AND TECHNICAL ENGINEERS UIOE LOCAL UNION NO. 17D;

OR

NO UNION.

The date, time and place of the election, will be specified in the Notice of Election which will issue shortly.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. In addition to those employees in the unit who were employed during the payroll eligibility period, all employees who were employed by the Employer for a total of 30 working days or more within the period of 12 months, or who have had some employment within that period and who have been employed 45 or more working days within the period of 24 months, immediately preceding the election eligibility date for the election, shall also be eligible to vote. *Daniel Construction Co., Inc.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 14, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for

setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website www.nlrb.gov,[13] by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **four** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional office.

C. Notice of Posting Obligation

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

[13] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT **June 21, 2012**. The request may be filed electronically through the Agency's web site, www.nlrb.gov,[14] but may not be filed by facsimile.

DATED at Buffalo, New York this 7th day of June, 2012.

/s/Rhonda P. Ley
RHONDA P. LEY, Regional Director
National Labor Relations Board
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

[14] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.